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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY FLORES CAMACHO, Defendant and Appellant.	C094214 (Super. Ct. No. 00F06978)

A jury found defendant Anthony Flores Camacho guilty of first degree murder, robbery, and carjacking. The jury could not reach verdicts on two felony-murder special-circumstance allegations and the trial court dismissed the allegations in the interests of justice. Defendant later filed a petition for resentencing under Penal Code

section 1170.95.[1] After issuing an order to show cause and receiving evidence from the parties, the trial court denied defendant's petition.

On appeal, defendant contends the trial court's dismissal of the special circumstance allegations was equivalent to an acquittal, and the court was thus required to grant his petition. He further argues there was insufficient evidence to support the court's conclusion that he was a major participant in the underlying felonies and acted with reckless indifference to human life.

Disagreeing, we affirm the trial court's order.

FACTS AND PROCEEDINGS

Defendant's convictions arise out of a carjacking in which defendant and three codefendants, Alex Santana, Jose Rivera, and Ted Santos, stole a car during a test drive from a car dealership; Santana shot and killed a car salesman during the drive. (*People v. Rivera* (Sept. 28, 2004, C042375) [nonpub. opn.].)[2] The day of the murder, the four drove to the dealership and discussed their plan to take a car from the dealership for a test drive, force the salesman/victim out of the car, and take the car. (*Ibid*.)

The victim agreed to take defendant and Santana on a test drive of a Camaro. The three went to a nearby gas station first to purchase gas for the car. Defendant then drove the car onto the highway, with the victim in the front passenger seat and Santana in the rear passenger seat. Santana shot the victim and defendant pulled over to the side of the highway to throw the victim out of the car. Defendant then drove away. (*People v. Rivera, supra*, C042375.)

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[1] Undesignated statutory references are to the Penal Code.

[2] Both parties rely on the facts set out in *Rivera*, which involved codefendant Rivera's appeal, although defendant does not agree that the facts therein are "necessarily complete." We summarize the facts from that opinion for context, but provide further details from the record of conviction, included in our record on appeal.

Evidence at Trial

At trial, defendant testified in his own defense and the prosecution introduced a video recording of an interview defendant had given to police the day after the murder.

According to defendant, Santana wanted to use defendant's false driver's license at the dealership if they required identification for a test drive. Santana told defendant he wanted to use the test drive as a pretext for stealing a car. Santana said the transmission on his car, also a Camaro, was broken. He had recently tried to steal a car off the street because he liked the lights on the car, but his attempt was foiled. He had also tried stealing a car from a different dealership but was unsuccessful as he and Rivera were not permitted to test drive the car.

Santana told defendant the two would take a car for a test drive on the freeway, defendant would pull the car over to the side of the freeway, and Santana would then force the victim out of the car at gunpoint. Defendant later explained that after seeing Santana had a gun, defendant, "knew then--knew [Santana] was going to do something. But I didn't know what [Santana] was going to do. I didn't think [Santana] had the balls to do something like that . . . . [¶] . . . [¶] I figure[d] [Santana] might, but I didn't think [Santana] had the balls to do something like that. You know it takes some big balls to do some shit like that."

Once they arrived at the dealership, defendant asked the victim for a test drive.[3] Before the test drive, the victim said he needed to drive the car to the gas station, so defendant got in the front passenger seat and Santana sat behind him. At the gas station, the victim asked who would be driving the car and defendant volunteered. The victim sat in the front passenger seat, buckled his seatbelt, and directed defendant to get on the freeway.

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[3] Defendant initially said he asked for the test drive, but later testified Santana announced they would be taking a test drive at the dealership.

After getting on the freeway, defendant said he heard the car making a noise and pulled over to the shoulder. When defendant put the car in park, Santana said, "[d]on't move," and shot the victim in the head. A nearby driver saw the Camaro parked on the shoulder with its passenger door open, and saw a person get "thrown" out of the car. Defendant pulled back into traffic and drove away while weaving in and out of traffic to avoid a car he suspected contained an undercover officer.

Defendant and Santana parked in a parking lot, where they wiped the Camaro down. They were picked up by Rivera, who drove them to the waterfront, where Santana threw his gun and defendant's shirt, which he had used to wipe down the car, in the river. The four then went to Rivera's apartment. Santana and Rivera left to retrieve the Camaro while defendant and Santos remained. Santana and Rivera returned after seeing police and news cameras at the Camaro. Defendant got a bag for Santana's clothes and he and Santana threw the bag into the garbage. The four then went on an errand in Lodi and returned before dropping defendant off at home. They discussed what to say if they were caught by police.

At trial, defendant disclaimed his earlier statements that there had been a plan to take the car and said Santana was just "joking around." He testified he was forced into Santana's scheme under duress. He claimed he was only "somewhat truthful" in his police interview because he was scared of Santana.

A medical expert testified that it would have been difficult to move the victim's body after he had been shot in the head. Rivera's uncle testified he came to the apartment after the murder and found defendant and the three codefendants watching television and laughing.[4]

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[4] At trial, the uncle stated the laughter was in response to a joke he had made, but he did not mention a joke in an earlier police interview.

The jury found defendant guilty of first degree murder (§ 187; count one), robbery (§ 211; count four), and carjacking (§ 215; count five).[5] As to all three counts, the jury found true allegations that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The jury could not reach a verdict as to the special circumstance allegations that the murder occurred in the commission of a robbery or carjacking, and the trial court declared a mistrial as to those allegations. (§ 190.2, subd. (a)(17).)

Senate Bill No. 1437

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill No. 1437), which became effective on January 1, 2019, was enacted "to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) The legislation accomplished this by amending sections 188 and 189 and adding section 1170.95 to the Penal Code.[6]

Section 188, which defines malice, now provides in part: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3), as amended by Stats. 2018, ch. 1015, § 2.) Section 189, subdivision (e) now limits the circumstances under which a person may be convicted of felony murder: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [defining first degree murder]

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[5] Counts two and three were dismissed at the close of evidence.

[6] The Legislature further amended section 1170.95, effective January 1, 2022, under Senate Bill No. 775 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 551, § 2). This amendment is not at issue in this appeal.

in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2." (Stats. 2018, ch. 1015, § 3.)

Senate Bill No. 1437 also added section 1170.95, "which provides a procedure for convicted murderers who could not be convicted under the law as amended to retroactively seek relief." (*People v. Lewis* (2021) 11 Cal.5th 952, 959.) "If the trial court determines that a prima facie showing for relief has been made, the trial court issues an order to show cause, and then must hold a hearing 'to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced, provided that the new sentence, if any, is not greater than the initial sentence.' (§ 1170.95, subd. (d)(1).) 'The prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.' (§ 1170.95, subd. (d)(3).) At the hearing stage, 'the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' " (*Id.* at p. 960.)

Section 1170.95 Petition

In 2019, defendant filed a petition requesting resentencing under section 1170.95. The trial court issued an order to show cause and set a hearing date, asking for briefing on the evidentiary rules for the hearing and the effect, if any, of the mistrial on the special circumstance allegations. The parties filed briefing, attaching the transcripts from trial.

The trial court denied defendant's petition in a written order. In the order, the court recited the facts of the case as summarized in the *Rivera* opinion. After laying out the procedural rules and relevant burden of proof, the court considered whether defendant was a major participant who acted with reckless indifference to human life, and thus could still be convicted of murder under current law. Reviewing the factors laid out in *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), the court observed defendant's participation in planning the crime was minimal, he was not involved in procuring the firearm used, and was not aware of any particular danger in the crime. He was present at the scene of the crime, although it was not clear whether he had the ability to prevent the crime. There was "significant evidence" of defendant's participation in events after the murder, including helping Santana dispose of the victim, who was still alive at the time; attempting to evade pursuit in the Camaro; wiping down the Camaro to cover their tracks; and assisting Santana in hiding or destroying evidence. Based on his presence at the scene of the crime and his conduct after the crime, the court determined defendant was a major participant who acted with reckless indifference to human life.

Defendant timely appealed. The case was fully briefed on January 27, 2022, and assigned to this panel on February 25, 2022. The parties waived argument and the case was deemed submitted on June 10, 2022.

DISCUSSION

I

Dismissal of Special Circumstance Allegations

Defendant argues he is entitled to relief because the trial court's dismissal of the special circumstance allegations constituted a jury finding that he did not act with reckless indifference to human life and was not a major participant in the underlying felonies. Thus, he argues his petition should have been granted before it even proceeded to an evidentiary hearing based on section 1170.95, subdivision (d)(2), which requires

resentencing if "there was a prior finding by a court or jury that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony." We disagree.

A. *Additional Background*

At the close of evidence, defendant moved to dismiss the felony-murder special-circumstance allegations under section 1118.1, arguing there was insufficient evidence to establish defendant showed reckless indifference or was a major participant in the felonies. The trial court denied the motion saying, "there is sufficient evidence from which a jury can reasonably conclude that those special circumstances are true."

During deliberations, the jury submitted a note to the court indicating they were "split on the two special circumstances under Count 1." The court excused the jurors for the day and instructed them to return in the morning to see if they were still deadlocked. The next day, the court asked the jury about the split, and the foreperson stated the jury was split six to six after eight ballots. After a conversation with counsel, the court declared a mistrial as to those allegations and received the remainder of the verdict.

After the court sentenced defendant, defendant inquired about the special circumstance allegations, and the prosecutor stated that "a 26 year to life sentence is just in this case, and we move to dismiss [the special circumstance allegations]." The court granted the motion without further comment.

B. *Analysis*

If a jury or court has previously found there was insufficient evidence to support a felony-murder special-circumstance allegation, resentencing is required under section 1170.95, subdivision (d)(2). (*People v. Clayton* (2021) 66 Cal.App.5th 145, 155; *People v. Ramirez* (2019) 41 Cal.App.5th 923, 932.) In *People v. Hampton* (2022) 74 Cal.App.5th 1092, we considered whether the dismissal of a special circumstance allegation, after a mistrial on that allegation, constituted an acquittal for legal insufficiency. We explained, "[s]ection 1385 dismissals should not be construed as an

acquittal for legal insufficiency unless the record clearly indicates the trial court applied the substantial evidence standard. [Citation.] There are no 'magic words' the court must use to demonstrate it has applied the substantial evidence standard, and the court need not restate the substantial evidence standard. [Citation.] But, the record must make it clear for the reviewing court that the trial court viewed the evidence in the light most favorable to the prosecution and found that no reasonable trier of fact could convict. [Citation.] Whatever label the ruling is given, the appellate court ' "must determine [if] the ruling . . . actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." ' " (*Hampton,* at p. 1104.)

In *People v. Hatch* (2000) 22 Cal.4th 260, "following a jury deadlock, the court declared a mistrial." (*People v. Hampton, supra,* 74 Cal.App.5th at p. 1104.) The trial court dismissed the case " 'in the interest of justice' because 'there is no reason to believe another jury would reach a verdict in this case one way or the other.' " (*Hatch,* at p. 266.) "The court did not state it was dismissing the case for insufficient evidence. Our Supreme Court noted while a court is allowed to dismiss for insufficient evidence under section 1385, it usually does not. Because such dismissals are not usually based on insufficiency of the evidence as a matter of law, and the trial court had not stated that as the grounds for the dismissal, the Supreme Court concluded the record must show the court intended to dismiss for insufficiency." (*Hampton,* at pp. 1104-1105.)

Here, there is no evidence the trial court intended to dismiss the special circumstance allegations based on insufficient evidence. Neither the court nor the parties referred to the evidence against defendant during the dismissal, and the prosecutor made clear the basis for his motion was simply that the special circumstance allegations were unnecessary because defendant had received a "just" sentence. Similarly, the court had already determined there was sufficient evidence to find the special circumstances true, and there is nothing to suggest the court had reconsidered that decision. Consistent with *Hatch* and *Hampton*, we conclude the dismissal of the special circumstance allegations

did not signify a lack of sufficient evidence for the allegations. Nor did the jury make any express finding as to the allegations. Thus, defendant's petition did not fall within the purview of section 1170.95, subdivision (d)(2), and he was not entitled to resentencing on that basis.

II

Sufficiency of the Evidence

Defendant argues there was insufficient evidence for the trial court to find he was a major participant in the robbery/carjacking and acted with reckless indifference to human life. He argues he was eligible for relief under section 1170.95 because he could no longer be convicted of murder following the changes made by Senate Bill No. 1437. We disagree.

A. *Standard of Review*

On appeal from a petition under section 1170.95, "[w]e review the trial judge's factfinding for substantial evidence. [Citation.] We ' "examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt." ' " (*People v. Clements* (2022) 75 Cal.App.5th 276, 298.) "We determine 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' [Citation.] In so doing, a reviewing court 'presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*People v. Edwards* (2013) 57 Cal.4th 658, 715.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

B. *Applicable Legal Principles*

Our Supreme Court has set out the elements required to establish a defendant was a major participant in a felony who acted with reckless indifference to human life. The former means a defendant's personal involvement must be "substantial" and greater than the actions of an ordinary aider and abettor to an ordinary felony murder. (*Banks, supra*, 61 Cal.4th at p. 802.) The ultimate question "is 'whether the defendant's participation "in criminal activities known to carry a grave risk of death" [citation] was sufficiently significant to be considered "major." ' " (*Clark, supra*, 63 Cal.4th at p. 611.)

Our Supreme Court identified the following list of nonexclusive factors to consider when analyzing whether a defendant acted as a major participant: (1) " 'What role did the defendant have in planning the criminal enterprise that led to one or more deaths?' "; (2) " 'What role did the defendant have in supplying or using lethal weapons?' "; (3) " 'What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants?' "; (4) " 'Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death?' "; and (5) " 'What did the defendant do after lethal force was used?' " (*Clark, supra*, 63 Cal.4th at p. 611, quoting *Banks, supra*, 61 Cal.4th at p. 803.) It is not necessary that each factor be present, but the presence of no single factor is dispositive. Instead, "[a]ll may be weighed in determining the ultimate question, whether the defendant's participation 'in criminal activities known to carry a grave risk of death' [citation] was sufficiently significant to be considered 'major.' " (*Banks*, at p. 803.)

As for the mens rea requirement of reckless indifference to human life, our Supreme Court has explained that a defendant must be " ' "*subjectively* aware that his or her participation in the felony involved a grave risk of death." ' " (*Banks, supra*, 61 Cal.4th at p. 807.) The question is "whether a defendant has ' "knowingly engag[ed] in criminal activities known to carry a grave risk of death." ' [Citations.] The defendant

must be aware of and willingly involved in the violent manner in which the particular offense is committed, demonstrating reckless indifference to the significant risk of death his or her actions create." (*Id*. at p. 801.) This requires more than the foreseeable risk of death inherent in any armed crime. (*Id*. at p. 808; see also *Clark, supra*, 63 Cal.4th at pp. 617-618 [participation in an armed robbery, alone, does not demonstrate reckless indifference to human life].) Instead, the defendant must consciously disregard a substantial and unjustifiable risk to human life. (*Clark*, at p. 617.) In addition to a subjective component, the reckless indifference element also encompasses an objective component; a reviewing court asks whether the defendant's behavior was a " 'gross deviation' " from what a law-abiding person would have done under the circumstances. (*Ibid*.)

Recognizing the overlap between the major participant and reckless indifference elements (*Clark, supra,* 63 Cal.4th at pp. 614-615), our high court has considered the following list of nonexclusive factors in determining whether a defendant acted with reckless indifference to human life: (1) a defendant's knowledge of weapons, and use and number of weapons; (2) a defendant's physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) the duration of the felony; (4) a defendant's knowledge of the cohort's likelihood of killing; and (5) a defendant's efforts to minimize the risks of the violence during the felony (*id*. at pp. 618-623). No one factor is required or dispositive. (*Id*. at p. 618.)

In *Clark*, the defendant and two relatives conducted surveillance of a computer store at closing time. (*Clark, supra*, 63 Cal.4th at pp. 612, 623.) Clark secured use of a U-Haul truck. (*Id*. at pp. 536, 612.) The plan was for the first man to enter the store around closing time with an unloaded gun and handcuff the remaining employees in the restroom so no one could call the police. (*Id*. at p. 613.) While Clark sat in the parking lot in a car, others were to help the first man remove computers from the store and load them into the U-Haul. However, before any computers could be removed, the mother of

one of the handcuffed employees came into the store. The first man shot her in the head and fled to Clark's car. Clark drove away, leaving the shooter to be apprehended in the parking lot by an officer who overheard the gunshot. The gun used for the murder had been loaded with one bullet. (*Id*. at pp. 536-538, 613.)

Beginning with the major participant factors, the *Clark* court observed that although defendant had a prominent role in planning the underlying crime, the plan had gone awry. "No evidence was presented about defendant's awareness of the particular dangers posed by the crime, beyond his concern to schedule the robbery after the store's closing time. No evidence was presented about his awareness of the past experience or conduct of . . . the shooter. Defendant was in the area during the robbery, orchestrating the second wave of the burglary after [the shooter] secured the store, but defendant was not in the immediate area where [the shooter] shot [the victim]." (*Clark, supra*, 63 Cal.4th at pp. 613-614.) The court concluded that "the evidence was insufficient to support that he exhibited reckless indifference to human life." (*Id.* at p. 614.)

The court explained that the fact that Clark knew a gun would be used was insufficient under these specific facts to establish reckless indifference. (*Clark, supra*, 63 Cal.4th at pp. 618-619.) Clark was in his car in the parking lot when the victim was shot and was not provided with an opportunity to provide a restraining influence on his murderous cohort. (*Id*. at p. 619.) While the court acknowledged that the jury may have inferred Clark was aware the victim had been shot when he drove from the scene, indicating a lack of regard for the victim's welfare, the court noted that Clark knew help was on the way in the form of police intervention. (*Id*. at p. 620.)

The court also noted that "the period of interaction between perpetrators and victims was designed to be limited." (*Clark, supra*, 63 Cal.4th at p. 620.) There was no evidence the shooter was known to have a propensity for violence or Clark knew of such a propensity. (*Id*. at p. 621.) Given Clark's "apparent efforts to minimize the risks of violence" including planning the robbery for closing time and planning for use of an

unloaded gun that ended up loaded with only one bullet (*Clark*, *supra*, 63 Cal.4th at pp. 621-622), the court concluded: "[H]ere there appears to be nothing in the plan that one can point to that elevated the risk to human life beyond those risks inherent in any armed robbery. Given defendant's apparent efforts to minimize violence and the relative paucity of other evidence to support a finding of reckless indifference to human life," insufficient evidence supported the special circumstance findings. (*Id.* at p. 623.)

C. *Analysis*

In this case, the underlying felonies for purposes of felony-murder liability were robbery and carjacking. As relevant here, robbery required the People to prove: (1) defendant took property that was not his own; (2) the property was in the possession of another person; (3) the property was taken from the other person; (4) the property was taken against that person's will; (5) defendant used force or fear to take the property or prevent the person from resisting; and (6) when defendant used force or fear, he intended to deprive the owner of the property permanently. Defendant's intent to take the property must have been formed before or during the time he used force or fear. (CALCRIM No. 1600.) Likewise, carjacking requires that: (1) defendant took a motor vehicle; (2) the vehicle was taken from the immediate presence of a person who possessed the vehicle or was its passenger; (3) the vehicle was taken against that person's will; (4) defendant used force or fear to take the vehicle or to prevent that person from resisting; and (5) when defendant used force or fear to take the vehicle, he intended to deprive the other person of possession of the vehicle either temporarily or permanently. (CALCRIM No. 1650.)[7]

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[7] The jury was instructed with CALJIC No. 9.40 (robbery) and CALJIC No. 9.46 (carjacking), which list the same elements as their contemporary counterparts in slightly different configurations.

Applying the relevant factors, a rational jury could have reasonably concluded that defendant was a major participant in the felonies. Regarding planning, defendant was in on the plan and his false driver's license was considered an important component thereof. In one version of defendant's various explanations of the relevant events, defendant himself asked the victim for a test drive, then volunteered to drive the Camaro, placing the victim in the vulnerable position in front of Santana. This choice permitted Santana the freedom to shoot the victim in the head from behind. There was evidence defendant was aware that the victim would be forced out of the car, on the freeway, by use of a gun. Defendant stated he had a suspicion that Santana could "do some shit like that," although he was not sure whether Santana "had the balls" to actually shoot the victim.

There was no evidence defendant supplied or personally used any firearms in the crime, which weighs in his favor. Nor was there evidence that defendant knew of any past dangerous conduct by Santana. Although there was evidence Santana was a "bully" and frequently bragged about taking cars and other property, no evidence suggested he had ever killed anyone. But the trial court was free to decline to credit defendant's testimony that he thought Santana was only joking around when he made statements about criminal conduct. It strains credulity to claim defendant thought the victim would hand over the car on the side of the freeway simply because the two men asked for it. The men did not take the opportunity to steal the Camaro while the victim was paying for gas at the gas station, instead waiting until they could leave the victim on the side of the freeway. A rational fact finder could infer the men made this decision because they wanted to ensure that the victim was away from witnesses and unable to call for help, enabling their escape. At minimum, it would be reasonable to conclude that defendant was aware that some level of force involving a firearm would be used before they forced the victim out of the Camaro and onto the freeway.

Defendant was present at the scene of the crime. Defendant was with Santana when they first spoke to the victim at the car dealership and was *the only other person in the Camaro with Santana and the victim before, during, and after the murder*. Although it is unclear whether defendant was in a position to prevent the actual murder, as the evidence suggests Santana was the leader of the plan and the shooting appears to have happened relatively quickly, defendant's actions facilitated the murder by ensuring that the victim was seated in front of Santana and by pulling over to the side of the freeway in accordance with the plan, signaling Santana to take action against the victim.

Moreover, defendant was in the car with Santana and the victim through at least one stop at the gas station before the murder, and a rational fact finder could conclude defendant could have or should have used this time to take actions to prevent the murder. Defendant testified, as part of his duress defense, that he wanted to steal the car at the gas station, but Santana threatened to "blast" him and forced him to continue. While such a version of events could suggest defendant's perceived inability to prevent the murder, it would also give him clear knowledge of Santana's violent proclivities before the murder. (*Clark, supra*, 63 Cal.4th at p. 619.) Alternatively, a fact finder could reject defendant's duress claim, which he did not present in his earlier police interview, and conclude defendant simply chose not to take any action to avert the impending crime.

As the trial court noted, defendant's actions after the use of lethal force weigh strongly against him. Defendant assisted in dumping the victim on the side of the freeway while the victim was still alive after being shot in the head, and immediately drove away, attempting to evade what he thought was a police officer.[8] He did not assist the victim or attempt to summon help. Rather, he assisted Santana in escaping, then helped him destroy evidence. He then spent more time with Santana, accompanying him

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[8] Defendant was being followed by a curious passerby who was trying to get his license plate number.

back to a place of safety, watching television and laughing with him, and helping him dispose of evidence in the garbage. He also went on a trip to Lodi with Santana before returning home. The four defendants also discussed what they would do if they were caught by police. A rational fact finder could construe these facts to mean that defendant was a full, willing, and substantial participant in the underlying felonies.

Defendant argues it was Santana who pushed the victim onto the freeway, rather than defendant, consistent with defendant's statements to the police. Given the positioning of defendant and Santana in the Camaro, as well as the fact the victim was wearing a seatbelt and testimony that he would have been difficult to move, a reasonable fact finder could discount defendant's statements and instead infer he assisted in throwing the victim out of the car. Or, a fact finder could accept defendant's statement, but still find that he failed to assist the victim and instead made a quick escape with Santana. Either conclusion would be reasonable under the circumstances, and either scenario includes sufficient evidence to support a finding that defendant was a major participant. We thus disagree that the trial court's finding on this point shows the trial court "did not read the record" or otherwise prejudicially erred, as defendant argues.

As to the reckless indifference element; as we have already explained, there was evidence describing defendant's role in the plan to steal the car and force the victim out of the car, as well as defendant's awareness that a gun would be used in this process and, at the least, suspicion that Santana "was going to do something." While not sufficient by itself to establish reckless indifference, it was appropriate for the trial court to consider the defendant's awareness of the firearm. (*Clark, supra*, 63 Cal.4th at p. 618.) Defendant was also the only other person present before, during, and after the underlying crimes as well as the murder, which weighs in favor of a finding of reckless indifference. (*Id.* at p. 619 [physical presence allows defendant to "observe his cohort[] so that it is fair to conclude that he shared in their actions and mental state"].) Despite his presence, defendant did not render aid, instead focusing on his escape.

We disagree with defendant's contention that his conduct in this respect was no worse than that of the defendants in *Banks*, *Clark*, and *Enmund v. Florida* (1982) 458 U.S. 782. In both *Banks* and *Enmund*, unlike here, the defendants were not present at the scene of the crime, "did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance." (*Banks, supra*, 61 Cal.4th at p. 807.) Likewise, in *Clark*, the court observed that while Clark drove away from the scene, indicating a lack of regard for the victim's welfare, he knew help was on the way in the form of police intervention. (*Clark, supra*, 63 Cal.4th at p. 620.) Here, defendant drove away from the scene without such knowledge. Rather than concern for the victim's welfare, there was evidence defendant and his friends were watching television and laughing not long after. And, unlike in *Clark*, defendant facilitated Santana's getaway and assisted him in the destruction of evidence following the crime. (*Ibid*.) Finally, we reject defendant's argument that the victim would have died even had defendant assisted him. No evidence suggests defendant knew this at the time of the murder, and the relevant question is what actions defendant actually took after the murder, not whether the victim would have survived in a hypothetical scenario where defendant had assisted him. (*People v. Smith* (2005) 135 Cal.App.4th 914, 927-928.) A reasonable fact finder could infer, based on his actions, that defendant was concerned about his own potential legal liability after the murder, and not the victim's life.

As to the duration of the interaction between the perpetrators and the victims, the murder occurred after transactions at the dealership and gas station and an extended car ride during which only the victim, defendant, and Santana were present. Defendant drove, which freed up Santana, whom defendant knew was armed, and Santana sat in the rear passenger seat behind the vulnerable victim. Thus, there was a " 'window of opportunity for violence' " because the plan called for Santana to lie in wait for the correct moment to ambush the victim. (*Clark, supra*, 63 Cal.4th at p. 620.) There is

similarly no evidence that any efforts were taken to limit the duration of the crime or otherwise prevent violence. Unlike in *Clark*, where Clark planned for limited interaction between the robbers and a limited number of victims, here the crime occurred by isolating the victim from his dealership or others who could call for help, using deadly force to disable him, and fleeing in the Camaro. (*Id.* at pp. 620-621.) It is reasonable to conclude from these facts that defendant was not concerned about the potential loss of human life.

Although defendant asserts there is adequate evidence to conclude that he was *not* a major participant who acted with reckless indifference to human life, that is not the question we need answer here. Our task is to employ the substantial evidence standard of review and determine whether the conclusion the trial court *actually* reached is adequately supported. Similarly, that the trial court rejected some of defendant's statements and accepted others does not mean that the court refused to hear defendant's evidence; it simply means that the court weighed the evidence and made judgments about which statements to credit, which it was entitled to do as an independent fact finder. (*People v. Clements, supra*, 75 Cal.App.5th at p. 297; see also *People v. Houston* (2012) 54 Cal.4th 1186, 1215 [appellate courts " 'do not reweigh evidence or reevaluate a witness's credibility' " on substantial evidence review].) Taken as a whole, there is sufficient evidence to support the trial court's conclusion that defendant was a major participant who acted with reckless indifference to human life. Thus, the court did not err when it found defendant ineligible for relief under section 1170.95.

DISPOSITION

The trial court's order denying defendant's section 1170.95 petition is affirmed.

/s/
Duarte, J.

We concur:

/s/
Hull, Acting P. J.

/s/
Earl, J.